SUPREME COURT, U.S.
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No. 85-1672

In The

Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM D. MERCHANT,

Respondent.

On Appeal to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a defendant's rights to due process and to be free of unreasonable searches and seizures are violated by a warrantless search conducted pursuant to a probation condition, that was imposed in his absence, without his knowledge, and without his consent.

2. Whether the "good faith" exception to the Fourth Amendment exclusionary rule should be expanded beyond the warrant context to apply to law enforcement officers' purported reli nce on a search clause in a defective probationary order which the officers knew was entered without notice to the defendant.

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BRIEF FOR RESPONDENT

STATEMENT

Although the factual statement of the government's brief is substantially accurate, some clarification and elaboration will assist the Court's consideration of the issues.

1. Respondent never agreed that he would be bound by the conditions of probation. At the misdemeanor sentencing hearing on November 14, 1980, the Municipal Court articulated several conditions of probation and then an-

nounced that the "sentence will be stayed pending your appeal", but never inquired whether respondent consented to those conditions. Similarly, the form which respondent signed at the conclusion of the hearing called for respondent's acknowledgement that he had "read and understood the . . . conditions of probation" (E.R. 119), but nowhere did respondent manifest his consent to those terms.[1] More importantly, it is undisputed that respondent signed this document only because he knew that his sentence (including all of the terms of probation) had been stayed pending appeal and because he was informed that signing the document was necessary "to get the stay pending appeal. . . ." (J.A. 92-93, 185-186.)

The form which bears respondent's signature expressly required his formal supervision by a probation officer, who could direct petitioner to undergo counseling. (J.A. 33.) In the normal course of events where a defendant in criminal misdemeanor proceedings is admitted to formal probation in Santa Cruz County, the Municipal Court sends notice to the Probation Department which then assigns an officer to supervise the probationer (J.A. 202.) If the probationer fails to report to the officer, the department petitions the court to revoke probation. (*Ibid.*) Here, respondent was never assigned to nor referred to a

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[1]Petitioner continues to inaccurately refer to a second document as the Municipal Court's "judgment." (Petitioner's Brief at 3, n.1.) The state prosecutor previously described that document, which does not bear the judge's signature, as a "confinement form." (J.A. 184.) Moreover, although the District Court indicated it would take judicial notice that the document was "the formal sentencing document", it was never moved or received into evidence and is not a part of the record in this case. (J.A. 96, 184-185.)

probation officer; and respondent never reported to one. (*Ibid.*) Moreover, a petition to revoke respondent's probation for these reasons was never filed, the department recognizing that probation was stayed "pending the appeal outcome." (J.A. 89.)

2. The local prosecutor testified that she received complaints of gun fire occurring on respondent's property in early to mid-January, and learned of another incident allegedly involving a threat by respondent in early February. (J.A. 163-165.) Although she professed concern that respondent had violated the terms of his probation (J.A. 165-166), the prosecutor took no steps to ensure that respondent was assigned to a probation officer or received supervision. Instead, on February 11, 1981, the prosecutor filed a motion for "Clarification and/or Modification of Stay of Judgment" with the intention of conducting a warrantless search of respondent's residence as soon as possible after the motion was granted. (J.A. 171-173.) The prosecutor decided to file the motion because she was not sure whether the search clause was in effect. (J.A. 46, 63.)

This motion was heard by the Municipal Court on February 27, 1981. (Pet.App. 22a.) Notice of the motion had been served on respondent's counsel who appeared at the hearing. (J.A. 98.) However, it is undisputed that counsel had failed to inform respondent of either the motion or the hearing. (J.A. 98; 105.) Although the Municipal Court noted respondent's absence, it made no inquiry concerning respondent's waiver of his right to be present or of counsel's authority to act on behalf of respondent in his absence. (Pet.App. 22a.) Without objection from

respondent's counsel, the Municipal Court granted the motion and stated that respondent would "be *reinstated* on the terms of probation." (Emphasis added.) (*Ibid.*)

At the time of the hearing on the motion for clarification/modification the local prosecutor informed neither the Municipal Court judge nor defense counsel of her intention to conduct a warrantless search of respondent's residence as soon as possible after the motion was granted. (Pet.App. 12a.)

3. Shortly after the hearing on February 27, the prosecuting attorney informed an investigator in her office that the motion had been granted and told him that "I want a search . . . ." (J.A. 66, 123.) However, because of manpower difficulties, a search party could not be assembled until March 3, 1981, four days later. (J.A. 123-124.)

Also on February 27, respondent's counsel wrote a letter to respondent informing him for the first time of the prosecutor's motion and alerting respondent that his probation was now in effect. (J.A. 99-100, 109-110.) However, the letter was later returned to counsel unopened and respondent remained unaware of the court's order until nine armed police officers, led by the prosecuting attorney, arrived at his residence prepared to forcibly enter and search. (J.A. 100-101.)

The search party arrived at the premises at approximately 11:00 a.m. on Tuesday, March 3, 1981. (J.A. 115.) Included in its number were several local police officers, including representatives from narcotics enforcement, as well as the prosecuting attorney who had filed the motion to modify respondent's probation status in order to be

able to enter respondent's home without a warrant. (J.A. 82, 166, 179-180.) Upon the group's arrival at respondent's door, respondent insisted that he was not on probation and refused them entry. (J.A. 116-117.) There ensued "quite a lot of conversation." (J.A. 71.) Respondent then requested and was permitted to call his attorney, who spoke to the prosecutor and confirmed that respondent had not yet been informed of the February 27th order subjecting him to the terms of probation. (J.A. 71-73, 99, 116-117, 179-180.) The two attorneys went on to discuss the legal ramifications of the lack of notice, and the prosecutor asserted that "in a misdemeanor matter, an attorney's actions are binding on his client. The client does not need to be present." (J.A. 72.)

Following his conversation with the prosecutor, respondent's counsel telephoned the Municipal Court judge who had presided at the February 27th hearing. (J.A. 102.) Judge MARLO then telephoned the prosecuting attorney at respondent's residence to discuss the situation. (J.A. 74-75, 180.) Having been informed for the first time that respondent had never received notice of the February 27th proceedings and remained unaware of the Court's order until the arrival of the search party, Judge MARLO told the prosecutor:

> . . . on more than one occasion . . . well, don't, don't take this conversation to mean that I have any opinion as to whether you should or shouldn't be doing what your doing.
>
> (J.A. 74-75.)

Despite her knowledge that respondent's probation had been reinstated in his absence, without his knowledge,

and at proceedings at which respondent's counsel had appeared without authority, the prosecuting attorney determined that the search should begin. (J.A. 73.) Ultimately, the search produced the contraband, chemicals, and laboratory equipment which underlay the charges that were filed against respondent in the District Court. (J.A. 129-130.)

4. On the basis of the evidence discovered during the March 3, 1981 search, the Municipal Court revoked respondent's probation. Subsequently, however, the Superior Court appellate division reversed that decision on the grounds that respondent could not be bound by probation conditions which went into effect without his knowledge:

> Due process and elementary considerations of fairness preclude revocation of probation and imposition of a jail sentence unless the defendant had theretofore been unequivocally apprised of his probation status.
>
> (J.A. 200.)

5. In denying respondent's motion to suppress, the United States District Court held that respondent's probation was in effect from the date of his sentencing on the misdemeanor offenses—i.e., November 14, 1980. (Pet. App. 17a.)[2] Alternatively, the District Court held that even if respondent was not on probation, the suppression remedy was inappropriate because the officers who executed the search had reasonably relied on the probation order. (Pet.App. 18a.)

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[2]This holding made it unnecessary for the District Court to concern itself with the legal significance of the February 27th order, and the court did not in fact address that issue.

6. In reversing, the Ninth Circuit Court of Appeals first recognized that the question whether respondent was subject to the conditions of probation (and hence to the search clause) at the time of the March 3rd search is governed by state law, subject only to the minimum protections afforded by the federal constitution. (Pet.App. 4a.) The court next determined that under state law, respondent's entire probationary sentence was stayed because the sentencing Municipal Court judge did not specify otherwise. (Pet.App. 5a-6a.)[3] Significantly, petitioner does not seek review from this Court of either of these holdings.

The Court of Appeals next considered the effect of the February 27th order. (Pet.App. 6a-10a.) Given the Court of Appeals' prior holding that respondent was not on probation prior to that date, it followed that the Municipal Court's order vacating the stay constituted "an initial imposition of probation." (Pet.App. 8a.) Because the effect of that order was to impose substantial burdens on respondent's liberty and fundamental rights, the Court of Appeals held that federal due process was violated by the absence of any notice to respondent concerning the February 27th proceedings or order. (Pet.App. 8a-10a.) This aspect of its decision was supported, the Court of Appeals noted, by the fact that respondent's state and federal rights to be present at all stages of the proceedings had also been truncated by the Municipal Court's action. (Pet.App. 10a.) Finally, the Court of Appeals emphasized that the emasculation of respondent's rights

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[3]The Court of Appeals determined that this conclusion was compelled by *In re Kennick*, 128 Cal.App.3d 959, 963, 180 Cal. Rptr. 731, 733 (1982). See also, *People v. Soukup*, 141 Cal.App. 3d 858, 190 Cal.Rptr. 635 (1983).

in the Municipal Court proceedings was compounded by the decision of the state authorities not to "postpone [ ] the search until it could be sure that [respondent] had received notice [of the order] from the court." (Pet.App. 10a.)

The Court of Appeals also rejected the contention that the suppression remedy should not be invoked because of the executing officers' purported good faith reliance on the search clause of the probation order. (Pet.App. 10a-13a.) Assuming without deciding that the rationale of the *United States v. Leon*, 468 U.S. 897 (1984) might apply outside the warrant context, the Court of Appeals ruled that the suppression remedy was nevertheless mandated because "the state authorities' conduct was not objectively reasonable." (Pet.App. 11a, n. 6.) In reaching this conclusion, the Court of Appeals emphasized the single-mindedness with which the state authorities had engineered the "reinstatement" of respondent's probation and had then hastily organized a search despite their knowledge that respondent had received no notice that his probation had been "reinstated," and was consequently unaware that the probationary terms which the authorities suspected him of violating were then in effect.[4] The Court of Appeals concluded that the authorities' zealous determination to investigate suspected probation violations which they knew had occurred prior to the probation's "reinstatement,"

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[4]As the Court of Appeals noted, the state authorities determined to conduct the search while knowing that respondent had received no supervision or counseling, had not been referred to probation officer, and that no other efforts towards the rehabilitation of respondent or the protection of society had been made. (Pet.App. 12a.)

rendered their motives for the search suspect and their conduct objectively unreasonable. (Pet.App. 12a-13a.)

7. Following the Court of Appeals' decision, the government filed a petition for rehearing with a suggestion for *en banc* review. Said petition was reviewed by the entire court, but not a single judge requested a vote. (Pet. App. 19a.)

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INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Court of Appeals correctly ruled that the failure of actual notice to respondent of the February 27th hearing and order violated Due Process because that order deprived respondent of fundamental rights and liberty interests. Moreover, whether viewed as an "initial imposition of probation" (Pet.App. 8a) or as an advancement of probation's effective date, the February 27th order emasculated respondent's rights under California law to reject probation altogether or to seek a modification of specific probationary terms which he found objectionable before being subjected to them. Significantly, the "reinstatement" order was also invalid under state law; and *certiorari* on this issue was therefore improvidently granted.

Contrary to petitioner's assertions, the Court of Appeals ruling constitutes neither a departure from the principles of representative litigation nor an imposition of novel and onerous obstacles to the administration of justice. Instead, the decision merely mandates compliance with routine and common sense procedures which are in

fact independently required by California statute. Because the Municipal Court failed to follow these procedures, with the result that respondent received no notice of the hearing, the order "reinstating" probation was a nullity.

II. The government's invitation for this Court to consider extending the good faith exception to the exclusionary rule to include reasonable reliance on a defective probation order should be rejected in the first instance because this case does not arise from a valid probation search under California law.[5] Because the decision to search was made prior to the issuance of the order "reinstating" respondent's probation and the complaints which were purportedly being investigated had been lodged several weeks prior to that date, the search clearly was not based on a reasonable suspicion that respondent had violated a term of his probation. See, *People v. Guerrero,* 85 Cal. App.3d 572, 581, 149 Cal.Rptr. 555, 560 (1978). Similarly, because the officers learned prior to commencing the search that respondent had received no notice that he was on probation, they knew that respondent had also had no opportunity whatsoever to comply with the probationary terms, and they therefore had no reason to believe that "in connection with effective probation supervision, a search was advisable." *People v. Guerrero, supra,* 85 Cal. App.3d at 581, 149 Cal.Rptr. at 560.

The invitation should also be rejected for the simple reason that this is not a good faith case. Here, the exe-

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[5]Again, *certiorari* was improvidently granted on the good faith issue because the Court of Appeals' holding that the case does not involve a valid probation search under state law makes the officers' good faith irrelevant. (Pet.App. 12a-13a.)

cuting officers did not rely upon facially valid court rulings which, for reasons unknown to them, were defective. To the contrary, the leaders of the search party independently considered and rejected a potential legal inadequacy in the probation order which had not previously been presented to or ruled upon by the Municipal Court. Because the leaders determined to proceed with the search after receiving notice of a latent defect in the order upon which they relied, their decision to search first and to litigate the validity of the order later does not come within the rationale of the good faith exception as enunciated in *United States v. Leon, supra,* 468 U.S. 897 and *Massachusetts v. Sheppard,* 468 U.S. 981 (1984).

Finally, the policies which caused this court to fashion the good faith exception in the warrant context are not applicable to probation searches. In the probation context the magistrate plays no part in the decision to search; and, conversely, the executing officers rarely have any knowledge of the regularity of the court proceedings in which the order was fashioned. Accordingly, the cost benefit analysis which this Court found compelling in the warrant context militates against adoption of a similar rule where a search is conducted in reliance on a defective probation order.

ARGUMENT

I.

THE FEBRUARY 27TH ORDER PURPORTING TO REINSTATE RESPONDENT'S PROBATION VIOLATED DUE PROCESS OF LAW.

The pobationary terms that were announced by the Municipal Court at the sentencing hearing on November 14, 1980 contemplated substantial restraints on both respondent's liberty and his most fundamental constitutional rights. (J.A. 40.) These included his submission to supervision by a probation officer, his participation in therapeutic counselling, and the forfeiture of his rights to bear arms and to be free of unreasonable searches and seizures under the Second and Fourth Amendments. (J.A. 33, 40.) At the conclusion of the sentencing hearing, respondent correctly concluded that he was not subject to any of these restraints, duing the pendency of his appeal.[6] Nevertheless, on February 27, 1981, during proceedings at which respondent was not present and of which he had no actual notice, the Municipal Court issued an order purporting to impose on him all of the terms and conditions of probation as of that date. (Pet.App. 22a.)

As a consequence, and through no fault of his own, respondent was thereby unknowingly subjected to all of the restraints of liberty inherent in the terms of probation that the Municipal Court had announced on November 14, 1980. Given these fundamental implications, the Court of Ap-

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[6]The Court of Appeals' conclusion that respondent was not on probation following the November 14, 1980 hearing is not challenged by the government. (Pet.App. 5a-6a.) This conclusion was compelled by the applicable state law. See, *In re Kennick, supra,* 128 Cal.App.3d at 863, 180 Cal.Rptr. at 733.

peals correctly determined that the "reinstatement" order violated the due process clause of the Fourteenth Amendment and was a nullity. (Pet.App. 8a-10a.)

1. The legal significance of the Municipal Court's "reinstatement" order can only be understood in the context of the applicable state law concerning probation. California courts have adopted a contractual theory for the imposition of probation: in exchange for a less harsh sentence, the defendant may accept those restrictions of his rights which are inherent in the probationary conditions. *People v. Mason,* 5 Cal.3d 759, 763-764, 488 P.2d 630, 632, 97 Cal.Rptr. 302, 304-305 (1971), *cert. denied,* 405 U.S. 1016 (1972);[7] *In re Bushman,* 1 Cal.3d 767, 776-777, 463 P.2d 727, 733, 83 Cal.Rptr. 375, 381 (1970). As several courts have explained, "probation is a 'bargain' made by the People with the malefactor. . . ." *People v. Atwood,* 221 Cal. App.2d 216, 222, 34 Cal.Rptr. 361 (1963); *People v. Johnson,* 134 Cal.App.2d 140, 143, 285 P.2d 74, 76 (1955). Consistent with this approach, a defendant in the state's courts "has the right to refuse probation, a right of which he cannot lightly be deprived." *In re Osslo,* 51 Cal.2d 371, 377, 334 P.2d 1, 5 (1958). See also, *In re Bushman, supra,* 1 Cal.3d at 776, 463 P.2d at 733, 83 Cal.Rptr. at 381; *People v. Brasley,* 41 Cal.App.3d 311, 316, 115 Cal.Rptr. 910, 913 (1974).

Moreover, a defendant who appeals his conviction need not manifest such refusal at the sentencing hearing, but may wait instead until the appeal is finally resolved:

> [W]hatever may be within the trial court's permissible scope of conditions for *granting* probation it

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[7]*Mason* was disapproved on other grounds in *People v. Lent,* 15 Cal.3d 481, 541 P.2d 545, 124 Cal.Rptr. 905 (1975).

> could not make petitioners' right to *reject* the offer of probation conditional upon their immediate announcement of rejection.
>
> *In re Osslo, supra,* 51 Cal.2d at 382, 334 P.2d at 8 (emphasis in original).

In *Osslo,* for example, the California Supreme Court held that the petitioners could not be denied the right to reject probation and demand sentence following the final determination of their appeal, even though their sentences had not been stayed pending appeal. 51 Cal.2d at 382-383, 334 P.2d at 8. Here of course, respondent's sentence was stayed peding appeal by the Municipal Court. (See, Opp., *supra,* at 1.) Accordingly, respondent had the right to reject probation and to demand sentence when and if his appeal was resolved against him.

As a corollary to the above rules, California courts invoke an implied waiver theory of Fourth Amendment rights when a search clause is imposed as a condition of probation. Moreover consistent with this Court's decisions concerning the waiver of fundamenal rights, the state courts "jealously guard" against the wholesale or unwitting relinquishment of such rights in the probation context and "indulge every reasonable presumption against waiver. . . ." *Blair v. Pitchess,* 5 Cal.3d 258, 274, 486 P.2d 1242, 1253, 96 Cal.Rptr. 42, 53 (1971), quoting *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Thus, a waiver will not be presumed or implied;[8] where a waiver is found, it will be

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[8]See, *People v. Myers,* 6 Cal.3d 811, 817-818, 494 P.2d 684, 688, 100 Cal.Rptr. 612, 616-617 (1972) (defendant's status as an outpatient of a narcotics clinic did not imply waiver); *Freytes v. Superior Court,* 60 Cal.App.3d 958, 962, 132 Cal.Rptr. 26, 29 (1976) (no waiver where probation was revoked and reinstated without express reference to maintenance of the previous search condition).

strictly and narrowly construed;[9] and where a waiver is relied upon by government officials, they bear the burden of showing "by clear and positive evidence that the consent was freely, voluntarily and knowledgeably given. [Citations omitted.]" *Blair v. Pitchess, supra,* 5 Cal.3d at 274, 486 P.2d at 1253, 96 Cal.Rptr. at 53. See also, *People v. Shelton,* 60 Cal.2d 740, 744, 36 Cal.Rptr. 433, 436, 388 P.2d 665, 668 (1964).

From a constitutional perspective, then, probation under California law has many significant similarities to a plea bargain, which this Court has repeatedly considered. See, e.g., *Santobello v. New York,* 404 U.S. 257 (1971). In both instances, a consensual bargain is struck by which the state (through either the court or the prosecution) agrees to less than the maximum penalty in exchange for the defendant's relinquishment of specified rights and/or his commitment to perform specified deeds. See, *Mabry v. Johnson,* — U.S. —, 104 S.Ct. 2543, 2547 (1984); *Brady v. United States,* 397 U.S. 742 (1970); *People v. Mason, supra,* 5 Cal.3d at 763-764, 488 P.2d at 632, 47 Cal.Rptr. at 304-305. Given the fundamental implications of the defendant's side of the bargain, the courts in both contexts have also established rigorous procedures to assure that the defendant knowingly and voluntarily enters into the agreement. *Boykin v. Alabama,* 395 U.S. 238 (1969); *Santobello v. New York, supra,* 404 U.S. at 261-262; *People v. Mason, supra,*

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[9]See, *People v. Superior Court (Stevens),* 12 Cal.3d 858, 528 P.2d 41, 117 Cal.Rptr. 433 (1974) (consent to search "upon request" means defendant must receive advance notice of search); *People v. Bremmer,* 30 Cal.App.3d 1058, 1064, 106 Cal.Rptr. 797, 801 (1973) (probation condition permitting warrantless searches does not constitute waiver of right to be searched only upon reasonable cause).

5 Cal.3d at 763-765, 488 P.2d at 632-633, 47 Cal.Rptr. at 304-305. Thus, in both instances, if the defendant is erroneously or inadequately advised of the rights he is waiving by entering into the bargain, then he is entitled to relief which may include specific performance, rescission, or a modification to conform to the defendant's reasonable understanding. *Mabry v. Johnson, supra,* 104 S.Ct. at 2548, n.11; *Santobello v. New York, supra,* 404 U.S. at 262-263; *People v. Superior Court (Stevens), supra,* 12 Cal.3d 858, 528 P.2d 41, 117 Cal.Rptr. 433.

2. Applying these principles, it is clear that under California law there was no Fourth Amendment waiver in this case. At the sentencing hearing, respondent never consented to the probationary terms. Compare, *Freytes v. Superior Court, supra,* 60 Cal.App.3d at 962, 132 Cal. Rptr. at 29 (wherein defendant orally agreed to warrantless search condition). Nor did the written form which respondent signed at the conclusion of the hearing call for respondent's consent to the conditions. (J.A. 33.) Thus, the record does not contain a clear and unequivocal expression of respondent's free and voluntary consent to the terms of the probation, as required by California law. See, *People v. Myers, supra,* 6 Cal.3d at 819, 494 P.2d at 689, 100 Cal.Rptr. at 617.

Nor may this inadequacy be dismissed as a technical or insignificant omission. To the contrary, even if it could be argued that by signing the document setting forth the probationary conditions respondent implicitly consented to those terms, then the "bargain" that he struck was subject to the condition precedent that none of the probationary conditions would become effective until after respondent's appeal was resolved. Undisputably, this was

respondent's understanding. (J.A. 72-73.) Indeed, the record is uncontroverted that respondent signed the document only because he was informed that doing so was the *quid pro quo* for issuance of the stay pending appeal. (J.A. 92-93.) In other words, whatever respondent may have waived or consented to at the sentencing hearing was done with the express understanding that he would not be subject to any restraints during the pnedency of his appeal and could reasonably anticipate that the restraints would never go into effect, assuming that he prevailed on appeal. Accordingly, this was the bargain that was struck at the sentencing hearing, and respondent was entitled both to rely on it and to enforce it. See, *People v. Superior Court (Stevens), supra,* 12 Cal.3d 858, 528 P.2d 41, 117 Cal.Rptr. 433; *People v. Bemmer, supra,* 30 Cal.App.3d at 1064, 106 Cal.Rptr. at 801. See also, *Santobello v. New York, supra,* 404 U.S. at 262-263.

3. The conclusion that Due Process was offended by the reinstatement order is independently compelled by the decision of the Superior Court setting aside respondent's probation revocation. The Superior Court found that respondent had not been "unequivocally apprised of his probationary status" and therefore determined that punishing him for his failure to abide by the probationary terms would violate Due Process of Law. (J.A. 200.)[10] From this ruling it necessarily follows that there was also a failure to "unequivocally apprise" respondent that he had relinquished his Fourth Amendment rights, since *that*

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[10]The Superior Court was presumably relying on state constitutional provisions. Article I, Section 15 of the California Constitution guarantees defendants in state criminal proceedings that they will enjoy due process of law.

waiver was but an element of his "probationary status." Because such advisement is a prerequisite to a "knowing and intelligent waiver" [*People v. Myers, supra,* 6 Cal.3d at 819, 494 P.2d at 689, 100 Cal.Rptr. at 617; *Freytes v. Superior Court, supra,* 60 Cal.App.3d at 962, 132 Cal.Rptr. at 29], the Superior Court's order setting aside the probation revocation precludes a finding that respondent gave his advance-consent to warrantless searches on this record.[11]

4. Apart from the notice problems, the February 27th proceedings were also rendered fatally defective by respondent's absence. (Pet.App. 10a.)[12] As argued in respondent's Opposition to the Petition for a Writ of Certiorari, these procedural inadequacies provide independent state grounds for the Court of Appeals' decision. (Opp. at 8-16.) For this reason, the validity of the February 27th "reinstatement" order fails to present an important question of federal law, and *certiorari* was improvidently granted.

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[11]It is true, as petitioner notes, that the Superior Court included a disclaimer that its decision should not be construed as disagreement with the District Court's ruling in this case that the March 3rd search was lawful. (E.R. 118-119.) However, the lawfulness of the search was not before the Superior Court, and the state court judge cannot be faulted for failing to recognize tnat his determination that there was inadequate notice to respondent concerning his probationary status under state law would be binding on a federal court. (See, this Brief, *supra,* at 7.)

[12]Although the Court of Appeals declined to decide whether respondent's absence from the February 27th proceedings rendered them invalid (Pet.App. 10a, n. 5), the case law on this subject also mandates the result reached by the Court of Appeals.

Both the state and federal constitutions guarantee criminal defendants the right to be present at all stages of the proceedings. See, *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); *Olney v. Municipal Court,* 133 Cal.App.3d 455, 459, 184 Cal.Rptr. 78, 80 (1982); *People v. Kriss,* 96 Cal.App.3d 913, 916, 158 Cal.Rptr. 420, 421 (1979).[13] At the same time, the California legislature has granted defendants in misdemeanor proceedings the right to be *absent* and to appear through counsel. See, Penal Code § 977(a). However, because exercise of this statutory right necessarily entails a waiver of the more fundamental right to be present, the California courts characterize the former as "conditional" in nature:

> A defendant who absents himself must do so with full knowledge of the pendency of the criminal proceedings, as the waiver of the right to be present must be a knowing and intelligent one.
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> *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 460-461, 184 Cal.Rptr. at 81.

Turner v. Municipal Court, 131 Cal.App.3d 643, 648, 182 Cal.Rptr. 650, 652 (1982). Thus, where counsel appears without his client, the court must satisfy itself "that the acts of counsel are authorized by the absent defendant." *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 461, 184 Cal.Rptr. at 81. See also, *Mills v. Municipal Court,* 10 Cal.3d 288, 304-305, 515 P.2d 273, 285, 100 Cal.Rptr. 329 (1973); *Turner v. Municipal Court, supra,* 131 Cal.App.3d

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[13]In California, the right to be present is secured by Article I, Section 15, of the state constitution. See, *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 459, 184 Cal.Rptr. at 80.

at 648, 182 Cal.Rptr. at 652; *People v. Kriss, supra,* 96 Cal.App.3d at 917, 158 Cal.Rptr. at 422.[14]

In this case the record establishes that respondent was not present at the February 27th hearing, that the Municipal Court noted respondent's absence but did not inquire concerning counsel's authority, and that a waiver of respondent's right to be present was not otherwise shown. (Pet.App. 22a; J.A. 64.) Indeed, it is uncontroverted that respondent was completely unaware of the proceedings, thereby precluding a finding that he was "knowingly" absent and had authorized the acts of counsel. Accordingly, under California law, respondent's constitutional right to be present was violated by the February 27th proceedings.

Moreover, prejudice to respondent was manifest in the conduct of those proceedings in his absence and without proper inquiry by the court.[15] First, as previously demonstrated, the defective procedure ignored the require-

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[14]Pragmatically, California's courts permit reliance upon defense counsel's representation that his client is knowingly absent and has authorized counsel to act on his behalf. *Olney v. Municipal Court, supra,* 133 Cal.App.3d at 461, n. 5, 184 Cal.Rptr. at 81; *People v. Singer,* 115 Cal.App.3d Supp. 7, 11, 171 Cal.Rptr. 587, 589 (1981). However, the case law affirmatively rejects petitioner's contentions that "notice to counsel is considered notice to the client. . . ." and that the Municipal Court was justified in assuming proper notice to and waiver by respondent from the appearance of his counsel at the hearing. (See, e.g., *Turner v. Municipal Court, supra,* 131 Cal.App.3d at 648, 182 Cal.Rptr. at 652.) (Compare, Petitioner's Brief at 14-15.)

[15]An order issued in violation of a defendant's state constitutional right to be present cannot stand if the defendant was prejudiced by it. *People v. Kriss, supra,* 96 Cal.App.3d at 920, 158 Cal.Rptr. at 424; *People v. Williams,* 10 Cal.App.3d 745, 749-752, 89 Cal.Rptr. 364, 366-368 (1970).

ment of California law that respondent expressly consent to imposition of the terms and conditions of probation. *People v. Mason, supra,* 5 Cal.3d at 763-764, 488 P.2d at 631-632, 97 Cal.Rptr. at 304-305. Second, and conversely, the February 27th proceedings emasculated respondent's right to *reject* probation and demand sentence. See, *In re Osslo, supra,* 51 Cal.2d at 382, 334 P.2d at 8. Third, the hearing *in absentia* during the pendency of the appeal deprived respondent of any opportunity to seek modification of specific probationary terms (such as the search clause) which he found objectionable. *Id.*, 51 Cal.2d at 380, 334 P.2d at 8. Fourth, and most fundamentally, the proceedings permitted the Municipal Court to strip respondent of his Fourth Amendment rights and to impose affirmative obligations upon him (including the requirement that he forego his Second Amendment right to bear arms), in circumstances which both disserved the rehabilitative purposes of the search clause,[16] and precluded timely efforts by respondent to conform his behavior to probation's affirmative mandates.

5. The government's brief fails to address any of these issues. Instead, relying exclusively on decisions in civil cases, the government insists that "notice to a party's counsel . . . is equivalent to notice to the party himself" and that a party is deemed to have "notice of all facts,

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[16]As a matter of common sense, a probationary search clause cannot positively influence an individual's behavior if he is unaware that it has been imposed. If an individual has "*knowledge* he may be subject to a search at any time, he will be less inclined to have narcotics or dangerous drugs in his possession. [Empahsis added.]" *People v. Kern,* 264 Cal.App. 2d 962, 965, 71 Cal.Rptr. 105, 107 (1968). Without notice, however, the search condition can have no such effect.

notice of which can be charged upon [his] attorney." (Petitioner's Brief at 12-16.) See also, *Link v. Wabash R.R.*, 370 U.S. 626, 634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)). This argument, however, stands on several patently false premises.[17]

First, the government suggests that the scope of a litigant's right to actual notice of scheduled court proceedings is defined by the requirement that the opposing party personally serve him. (Petitioner's Brief at 12-13, 18.) Obviously, in the context of criminal proceedings, this is simply incorrect. Indeed, it cannot seriously be disputed that the full panoply of rights subsumed within the concepts of due process and the right to defend are personal to the accused.

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him" and who must be accorded "compulsory process for obtaining witnesses in his favor."
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> *Farretta v. California*, 422 U.S. 806, 819 (1975).

Consistent with this principle, this Court long ago recognized that the Fourteenth Amendment grants the ac-

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[17]The argument is also disloyal to the facts of this case. Here, notice to the attorney cannot be "deemed" to be notice to the client, because it is uncontroverted that respondent never had notice. Since the prosecutor learned of the failure of actual notice before making the decision to begin the search, the government cannot now resort to inferences and assumptions. Indeed, given these facts, any ruling by this Court as to what may have been "deemed" or "inferred" concerning notice would be merely advisory.

cused the right "to be present in his own person whenever his presence bears "a relation, reasonably substantial" to the meaningful exercise of his right to defend. *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934). And while it is true that the defendant may consent to the holding of proceedings in his absence, the courts universally agree that such consent will not be found unless the accused's knowing and intelligent relinquishment of his right to be present affirmatively appears in the record. *Taylor v. United States*, 414 U.S. 17, 19-20 (1973); *Diaz v. United States*, 223 U.S. 442, 455 (1912); *United States v. Christopher*, 700 F.2d 1253, 1261-1262 (9th Cir. 1983), *cert. denied*, 461 U.S. 960 (1983); *United States v. Crews*, 695 F.2d 519, 520-521 (11th Cir. 1983); *United States v. Crutcher*, 405 F.2d 239, 243-244 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969). Thus, at a minimum, Due Process requires personal notice to the accused whenever his rights to defend and to be present are implicated. *United States v. Christopher, supra*, 700 F.2d at 1261-1262; *United States v. Crews, supra*, 695 F.2d at 520-521; *United States v. Peterson*, 524 F.2d 167, 184-185, n.41 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *Government of Virgin Islands v. Brown*, 507 F.2d 186, 188-189 (3d Cir. 1975); *United States v. Crutcher, supra*, 405 F.2d at 243-244.

Second, the government contends that because defense counsel has a duty to keep his client abreast of developments in the litigation,[18] the prosecution and the trial court may reasonably assume that counsel has fulfilled that obligation. However, this proposition is flatly contradicted by

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[18]Here, defense counsel admitted that he failed to fulfill this aspect of his professional obligations to respondent. (J.A. 105.)

the foregoing authorities governing waiver of a defendant's right to be present.[19] More generally, this Court has long recognized that it is ultimately the trial court's responsibility to ensure the regularity of its proceedings and to see that they are fundamentally fair. See, e.g., *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) (court must dismiss where government deports a material witness with "reasonable likelihood" that witness' testimony would have affected verdict); *Webb v. Texas*, 409 U.S. 95 (1972) (court must protect against interference with defendant's right to call witnesses); *Brady v. Maryland*, 373 U.S. 83 (1963) (court must assure that prosecutor does not suppress material evidence). This obligation includes taking reasonable steps to see that even those defendants who enjoy the assistance of counsel do not unwittingly relinquish substantial rights. See, e.g., *Boykin v. Alabama, supra*, 395 U.S. 238.

Third, ignoring the fundamental implications of the "reinstatement" order entailed for respondent, the government assumes that the February 27th proceeding involved "a purely legal question" and was therefore not a "critical point" in the litigation that would trigger respondent's right to be present. (Petitioner's Brief at 16-18.)[20] Quite

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[19]The proposition is also contrary to the applicable state law on the question. (See this Brief, *supra*, at 19-21.)

[20]The government's current understatement of the legal significance of the February 27th proceedings was flatly contradicted by the state prosecutor who, when asked why she assumed that respondent's counsel had informed respondent about the hearing, stated that "I couldn't imagine an attorney who would voluntarily put his client in that position and not tell him." (J.A. 68)

to the contrary, as previously demonstrated, enforcement of the probation order entailed the relinquishment of liberty interests and constitutional rights which were personal to respondent and which only he could waive. See, *People v. Myers, supra,* 6 Cal.3d at 817-818, 494 P.2d at 68, 100 Cal.Rptr. at 616-617. (See this Brief, *supra,* at 13-17.) Even more importantly, respondent had the absolute right to reject probation altogether. *In re Osslo, supra,* 51 Cal.2d at 377, 334 P.2d at 5. (See this Brief, *supra,* at 13.) Thus, far from a case in which defendant's presence would have been a mere formality and his impact on the fairness of the proceedings no more than a "shadow" (*Snyder v. Massachusetts, supra,* 291 U.S. at 105-106), respondent possessed the unfettered right to veto any order imposing probation and hence the power to dictate the outcome of the proceedings on the motion to reinstate probation. (See, this Brief *supra,* at 13-17.) Because the issuance of the reinstatement order in respondent's absence and without his knowledge thoroughly emasculated these rights, the proceedings were fundamentally unfair and violated due process of law.[21]

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[21]Indeed, given the nature of the probationary "bargain" under California law, the proposition that respondent's counsel could appear at a proceeding in his absence and accept the imposition of the probationary restraints without an affirmative showing in the record of a valid waiver by respondent, is as untenable as a suggestion that a defense attorney could validly plead his client guilty *in absentia* (and thereby waive all of his client's trial rights) on a similarly silent record. Obviously, under this Court's established precedent, such a plea could not stand. See, *Boykin v. Alabama, supra,* 395 U.S. 238; *Santobello v. New York, supra,* 404 U.S. at 261-262. Similarly, where as here the proceedings "amounted to an initial imposition of probation" (Pet.App. 8a.), the rights involved were too fundamental to be permitted to be silently and unknowingly waived. See, *Gardner v. Florida,* 430 U.S. 349, 358, 362 (1977); *Gagnon v. Scarpelli,* 411 U.S. 778, 786 (1973); *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972).

II.

THE EXCLUSIONARY RULE REQUIRES SUPPRESSION OF THE EVIDENCE OBTAINED BY LAW ENFORCEMENT OFFICERS DURING THE SEARCH OF RESPONDENT'S RESIDENCE.

Contrary to petitioner's assertions, this case fits within neither the rationale nor the principles of this Court's decisions in *Leon* and *Sheppard*. As the Court of Appeals recognized, the good faith exception should not be applied to a defective probation search, and even if it were applied, it could not save the instant search.

1. Petitioner concedes, as it must, that California courts independently review the reasonableness of each purported probation search, wholly apart from the validity of the underlying order. (Petitioner's Brief at 21-22.) This is because a probationer in California retains an expectation that his privacy will not be unreasonably disturbed. Thus, the search must be undertaken in furtherance of legitimate probationary objectives; there must be reasonable suspicion of a probation violation; and the search must be conducted in a reasonable manner. *People v. Guerrero, supra,* 85 Cal.App.3d at 581-582, 149 Cal.Rptr. at 560; *People v. Bremmer, supra,* 30 Cal.App.3d at 1065-1067, 106 Cal.Rptr. at 802-803. As the California courts explain, there can be no search unless the "cirmustances [indicate] that in connection with effective probation supervision [it] is advisable." *People v. Guerrero, supra,* 85 Cal.App. 3d at 581-582, 1149 Cal. Rptr. at 560; *People v. Kasinger,* 57 Cal.App.3d 975, 978, 129 Cal.Rptr. 483, 485 (1976). Such was clearly not true in this case.

Here, the officers (under the prosecutor's guidance) determined to enter respondent's residence with full

knowledge that his probation supervision had *not yet even begun.* (J.A. 76-77.) Not only had respondent never been assigned to a probation officer during the three and one-half months after his sentencing, but even at the February 27th hearing the prosecutor did not request and the Court did not order that respondent report to one. Thus, at the time of the search, respondent's supervision had never even been tried, and there was no rational basis for the assertion that a search was "advisable" to render his supervision "effective."

Similarly, it is undisputed that the reports of gun fire (which assertedly justified the search) were received several weeks prior to March 3rd, at a time when even the prosecutor was "unsure" as to whether respondent was on probation. (J.A. 46, 63.) In these circumstances, respondent reasonably believed that he was not on probation and was not subject to any prohibitions against his possession and use of firarms. Indeed, as the Court of Appeals held, respondent was not in fact on probation at the time of these complaints. (Pet.App. 6a.) See also, *In re Kennick, supra,* 128 Cal.App.3d at 1963, 180 Cal.Rptr. at 733.

Consequently, by March 3rd the gunfire reports were several weeks stale and could not reasonably support an inference that firearms were still located on the premises. More importantly, because the complaints were received at a time when respondent did not know that he was on probation (when the prosecutor was "unsure"; and when as matter of law was *not* on probation), they provided no logical basis for a belief that respondent had *violated* the conditions of his probation. Nor did these complaints indicate that respondent would fail to dispossess himself of any and all weapons (or to comply with the other terms of

probation), once apprised of the fact that he was subject to the probationary mandates. Thus, the Court of Appeals correctly determined that the search "had a motive of avoidance of Fourth Amendment requirements . . ." and was not "reasonably related to the interests of effective probation supervision." (Pet.App. 11a-13a.) See, *United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983); *People v. Guerrero, supra*, 85 Cal.App.3d at 582, 149 Cal.Rptr. at 559; *People v. Bremmer, supra*, 30 Cal.App.3d at 1064, 106 Cal.Rptr. at 801.[22]

The *Johnson* case, which is cited by the government (Petitioner's Brief at 22), is directly on point. There, the defendant had been placed on probation with the condition that he no longer associate with Bennett Brewer. *United States v. Johnson, supra*, 722 F.2d at 526. Because Brewer was defendant's then-current roommate, the court gave

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[22]Contrary to petitioner's assertions, the Court of Appeals properly seized upon the prosecutor's failure to inform Judge MARLO of either respondent's suspected activities or of her own intention to search respondent's residence, as further evidence in support of this conclusion. (See, Pet.App. 12a.) If in fact the stay had been validly lifted, then Judge MARLO was the individual who possessed the power to require respondent's supervision, to punish violations of his conditions, to modify those conditions, and to revoke probation. *In re Osslo, supra*, 51 Cal.2d at 380, 334 P.2d at 8. Thus, the prosecutor's decision to engineer the reinstatement order and then a search (but not to inform Judge MARLO of her intentions) demonstrates that she was not concerned with either respondent's rehabilitation or protection of the public, since she spurned the most efficacious means of accomplishing those ends. Her decision also confirms that in a very real sense there was a subterfuge: if the prosecutor wanted to search respondent's residence, she should have applied for a warrant. If she was concerned about respondent's performance on probation, she should have informed Judge MARLO or the probation department of her concerns so that those who were responsible for his supervision could decide what steps were appropriate.

defendant three weeks to sever relations with Brewer. *Id.* Nevertheless, eleven days later, the police searched defendant's bedroom for the purported reason that defendant had failed to comply with the probationary condition that he not associate with Brewer. *Id.* at 527. Applying California law, the Ninth Circuit Court of Appeals held that because defendant's offending conduct (i.e., association with Brewer) occurred at a time when defendant was not yet subject to that condition, the search was unreasonable and actually "frustrated the rehabilitative object of the condition." *Id.* at 528.

So too in this case. Here, the prosecutor determined that the search should go forward despite her knowledge that respondent's suspected misconduct had occurred weeks prior to his "reinstatement" on probation. Moreover, prior to commencing the search, the prosecutor knew that respondent had not been present at the February 27th proceedings, had not been aware of those proceedings, and had not authorized his counsel to appear without him.[23] Consequently, as in *Johnson*, it was not reasonable for the prosecutor to believe that a search was advisable in

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[23]These last facts demonstrate that the government's reliance on the theory that the "notice to a party's attorney should be deemed notice to the party" is thoroughly misplaced. (See this Brief, *supra*, at 23-24.) Whatever may be said concerning reasonable inferences of notice, the fact remains that respondent suffered no actual invasion of his privacy as a result of the "reinstatement" order until after the prosecutor knew that there had been a failure of notice in this case. Moreover, the government's repeated insistence that the prosecutor and officers were not obliged to trust respondent's protestations that he had received no notice of the hearing is irrelevant because it is undisputed that the prosecutor accepted the representations of respondent and his attorney but decided to search anyway. (J.A. 72-73.)

connection with respondent's effective probation supervision.[24]

Finally, the Court of Appeals' silence as to what crime "was supposedly the true object of the search" does not undermine its conclusion that the purpose of the search was not reasonably related to a probationary objective. (Compare, Petitioner's Brief at 31.) As the Court of Appeals recognized, a probation search under California law is valid only if undertaken for reasons related to legitimate probationary objectives. See, *People v. Guerrero, supra,* 85 Cal.App.3d at 581-582, 149 Cal.Rptr. at 560. Where a search is not so related, and particularly where, as here, the search is accomplished without the guidance or suggestion of a probation officer, it may fairly be presumed that the search was undertaken for other law enforcement purposes or for harassment. *Id.* See also, *In re Martinez,* 1 Cal.3d 641, 646-647, n.6, 463 P.2d 734, 737, 83 Cal.Rptr. 382, 385-386 (1970); *People v. Kern, supra,* 264 Cal.App. 2d at 964-965, 71 Cal.Rptr. at 106-107. While there was evidence in the record suggesting a subterfuge for a narcotics investigation, a finding on that question by the

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[24]The fact that the search in *Johnson* was also undertaken prior to the effective date of the "disassociation" probationary condition is a distinction without a difference. There can be no doubt that regardless of when the search occurred, it would have been unreasonable if undertaken to investigate conduct which allegedly violated a probationary condition and which had occurred at a time when that condition was not in effect. Surely, if the officers in *Johnson* had first "engineered" an advancement of the effective date of the "disassociation" condition without actual notice to the defendant and then had searched (as the prosecutor did here), their conduct would still have been thoroughly unreasonable.

Court of Appeals was immaterial to its holding that the case did not arise from a valid probation search.[25]

2. After a cautious and painstaking cost-benefit analysis, this Court fashioned the good faith exception to the exclusionary rule in search warrant cases and expressly limited the exception to that unique context. *United States v. Leon, supra,* 468 U.S. at 921. Because in such cases the judgment of a neutral and detached magistrate is interjected between the investigating officers and the decision to search, the Court recognized that the exclusion of evidence where law enforcement officers reasonably relied in good faith "on a subsequently invalidated warrant" would not further the deterrent rationale of the rule. *Id.* at 919-920. Moreover, the application of a good faith exception in that context has the salutary effect of encouraging police to heed the courts' "strong preference" for the procurement of search warrants. *Id.* at 914.

By contrast, there is no similar judicial policy favoring advance consent searches. Quite to the contrary, the courts are wary of such waivers and rigorously scrutinize the purported basis for them to assure that the defendant's right are not inadvertently or unknowingly forfeited. (See this

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[25]The record demonstrates that the very law enforcement personnel who conducted the search had been involved in a drug-related criminal investigation of respondent. (Pet.App. 12a-13a.) On at least one recent occasion, the prosecutor and another member of the search party who was a narcotics investigator had gone to respondent's property to investigate a tip that he was cultivating marijuana. (J.A. 163, 167-168.) This evidence supports the suggestion of a possible subterfuge, as does the prosecutor's conduct in filing a motion to reinstate probation rather than applying for a warrant, when her express purpose was to search respondent's residence. (See this Brief, *supra,* at 3.)

Brief, *supra*, at 13-16.) Any rule which permitted law enforcement officers to insulate their decision to conduct such searches on the grounds that *their* interpretation and reliance on a probation clause or other advance waiver was "reasonable" would seriously undermine *this* policy. At the same time, such a rule would actually frustrate the policy favoring the procurement of search warrants in all cases where the police officers believe that an advance waiver might arguably justify the intrusion.

Similarly, unlike search warrant cases, the decision to undertake an advance waiver search does *not* involve the judgment of a judicial officer. Instead, in most instances the police officers rely upon an order which predates the search, frequently by months or even years, for authority which they independently determine is applicable to the particular situation. Moreover, as distinguished from the search warrant context, in California and other states which do not require that the probation officer participate in the search, those who actually execute an advance consent search will frequently have had no involvement in the procurement of the underlying court order and therefore will have no personal knowledge concerning the regularity of the proceedings in which it was entered.[26]

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[26]Petitioner contends that as in the warrant context, an officer relying on a probation order cannot "reasonably be expected to question the judicial officer's judgment that the order is legally sound." (Petitioner's Brief at 25.) However, this is the crucial distinction between the two situations. Most often a much more substantial period of time elapses between the issuance of a probation order and the decision to search, than is true in warrant cases. See, e.g., Rule 41(c)(1) Fed. Rules Crim. Pro. (providing for a maximum period of ten days). Consequent-

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Taken together, these factors introduce in advance consent cases greater uncertainty as to the validity of the judicial authority, while vesting greater discretion in the police for determining whether a search is appropriate, than exists in search warrant cases. As a consequence, the objective reasonableness of the officers' conduct is a more elusive and less easily administered standard in the probationary context, and there is an unacceptable risk that deterrable intrusions will go undetected and unremedied. Accordingly, the good faith exception to the exclusionary rule should not be adopted in the context of advance consent searches.

3. The record fully supports the Court of Appeals' conclusion that the officers in this case did not possess an objectively reasonable belief in the validity of the search clause.[27] First, after the initial sentencing hearing, the officers knew that although respondent had been sentenced to formal probation, he was never placed under supervision or referred to the probation department.[28] Moreover, de-

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ly, there may be changes in the circumstances or in the law during the intervening period which render the probation order invalid or unreasonable. In such situations, the executing officers would not rely on any legal ruling that was actually made (or considered) by the judge, and thus the rationale for the good faith exception is not applicable. See, *United States v. Leon, supra,* 468 U.S. at 919-921.

[27]For this reason, even if the Court were inclined to consider extension of the good faith exception to searches based on defective probation orders, this is not an appropriate case.

[28]Because the local prosecutor was the motivating force for the search and was in fact the individual who finally determined at respondent's residence that the search should go forward, she was undeniably a member of the law enforcement team and her knowledge must be attributed to all of the executing officers. See, *United States v. Leon, supra,* 468 U.S. at 921 at n.24. The government does not contend otherwise.

spite respondent's failure to report to a probation officer, there had been no effort to "revoke" his probation.[29] Instead, when the gun fire complaints were received, the prosecutor expressed to the officers her good faith *doubts* that respondent was in fact on probation. (J.A. 46, 63.) Subsequently, when a hearing was held on her motion, the prosecutor's doubts were confirmed by Judge MARLO who ruled that probation was now "reinstated." (Pet.App. 22a.)

In these circumstances, the prosecutor should not be lauded for restraining herself from ordering a search of respondent's residence immediately upon learning of the gunfire complaints. (Compare, Petitioner's Brief at 26-27.) Had she done so, the search would have been blatantly unconstitutional and the prosecutor's subjective *bad faith* would have been unequivocally established since she admitted that she was "unsure" as to respondent's probationary status. (J.A. 46, 63.) Her failure to act "precipitiously" to order an illegal search of respondent's residence is therefore irrelevant to the question of her objective good faith when she did so a few weeks later.

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[29]The government's attempt to deflect the significance of these points is specious. True, a court's failure to require supervision of a probationer does not defeat the validity of the judgment. (Petitioner's Brief at 31-32, n.19.) Here, however, supervision *was* required and it was the failure of the probation department to provide it which demonstrates that all concerned parties believed probation to have been stayed. (J.A. 89.) Similarly, the government accurately notes that the probation department is authorized to determine the *level* of supervision that is necessary for a particular individual. Cal. Penal Code § 1202.8. Nevertheless, it is the court which determines whether there will be supervision. *In re Osslo, supra,* 51 Cal.2d at 380, 334 P.2d at 8. Thus, the probation department's decision not to provide *any* supervision "pending the appeal outcome" contradicts any assertion that respondent was on probation. (J.A. 89.)

Similarly, the officers in the search party were fully aware of the inadequacies of the February 27th proceedings. The prosecutor who led the search, and who had personally engineered that hearing for the purpose of conducting the warrantless search, also knew that respondent had not been present in court. However, as a prosecutor in California courts, she was certainly charged with knowledge of Penal Code § 977(a) and of the state law requirements for a criminal defendant's effective waiver of his right to be present. (See this Brief, *supra*, at 19-20.)[30] The officers' concerns in this regard is manifest in their willingness to engage respondent in "quite a lot of conversation" before entering the premises. (J.A. 71.)

More fundamentally, prior to her final approval of the commencement of the search, the prosecutor learned from respondent's attorney that respondent had in fact received no notice of the February 27 hearing and order. The prosecutor was thereby alerted to a constitutional infirmity in the "reinstatement" order which had not been known to Judge MARLO at the time of those proceedings. Moreover, despite the government's assertion that the officers were entitled to disregard respondents claims,[31] the

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[30]Perhaps the prosecutor was subjectively unaware of these requirements, because she had been with the office for a very short time. (J.A. 166.) If so, however, such ignorance would not render her conduct objectively reasonable.

[31]The government's good faith argument is premised on the contention that the executing officers were not compelled to believe respondent's statements concerning the lack of actual notice. (Petitioner's Brief at 28-29.) However, there is nothing in the record to support the proposition that the officers did not accept those representations. To the contrary, respondent's statements were corroborated by the prosecutor's knowledge that respondent had been present in court at the reinstatement hearing. Moverover, the record demonstrates that the prosecutor believed or assumed that a failure of actual notice had occurred, but determined to search anyway. (J.A. 72-73.)

prosecutor discussed the legal implications with respondent's counsel and concluded with her opinion that "in a misdemeanor matter, an attorney's actions are binding on his client." (J.A. 72.) Moments later, the prosecutor spoke with Judge MARLO himself who, having been apprised for the first time of respondent's lack of notice of the February 27th proceedings, declined to place his authority behind the search. (J.A. 74-75.) Nevertheless, despite their awareness of this express ambivalence from the only individual who was authorized by California law to require respondent's supervision, the prosecutor ordered that the search begin and the officers carried it out.[32]

These facts carry this case far beyond the *Leon* rationale. As this Court explained, that decision was founded on the proposition that law enforcement officers cannot reasonably be expected to question a judicial officer's conclusion that a warrant authorizing a search is legally sound. *United States v. Leon, supra,* 468 U.S. at 920-921. Where police officers submit such a legal question to a judge or magistrate, there is "literally nothing more [they can] do in seeking to comply with the law." *Id.* at 921.

Here, by contrast, the prosecutor and officers confronted legal issues which they knew had neither been presented to nor considered by Judge MARLO. Undisputably, the prosecutor made an independent legal judgment as to the authority for a search with knowledge of facts

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[32]Somewhat remarkably, the government now suggests that Judge MARLO's comments support a finding of objective reasonableness because the judge did not tell them that their search was unreasonable. (Petitioner's Brief at 29.) However, the conversation merely confirms that there were substantial reasons to doubt the validity of the probation order, that the search party possessed subjective concerns in this regard, and that they proceeded without judicial authorization.

and circumstances which had not been available at the time of the "reinstatement" hearing. Thus, in making the final decision to commence the search, the prosecutor and officers were not relying on any ruling of Judge MARLO, but were instead determining the appropriateness of a search by application of their own understanding of what the law required. This is precisely what occurs in every warrantless search, and *Leon* is therefore inapposite. See, *Leading Cases of the 1983 Term,* 98 Harv.L.Rev. 87, 114-118 (1984).

To summarize, the decision to proceed with the search on the facts of this case belies any assertion of objectively reasonable reliance on the February 27th order. Impetus for the search having arisen from suspected conduct predating the "reinstatement" order by several weeks, the search was conducted despite the officers' knowledge that respondent had received no opportunity whatsoever to conform his behavior to the probationary conditions by reason of a failure of actual notice to him. By petitioner's own admission, the officers undertook the search to determine whether respondent had firearms, but with the knowledge that respondent had never been told that he could not lawfully possess them. Thus, the prosecutor and officers knew of the fatal deficiencies in the probation order prior to commencing the search; and objectively reasonable officers should have realized that a warrantless

search under its tarnished authority was both unreasonable and fundamentally unfair.[33]

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CONCLUSION

The judgment of the Court of Appeals should be affirmed. Dated: October 6, 1986.

Respectfully submitted,

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[33]Because this case arose prior to this Court's decision in *United States v. Leon, supra,* 468 U.S. 897, the district court did not hold a "good faith" hearing. Instead, the court relied on the rationale that had been enunciated in *United States v. Williams,* 622 F.2d 830, 840 (5th Cir. 1980) (en banc), *cert. denied,* 449 U.S. 1127 (1981), without an evidentiary hearing focusing on the good faith issue. Accordingly, if this Court were to conclude that an objective good faith exception might arguably apply to this case, the matter should be remanded to the district court for a hearing at which the facts relevant to a good faith analysis under *Leon* could be developed and applied.